

1989

State of Utah v. Ricky Palmer : Response to Petition for Rehearing

Utah Court of Appeals

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490583-CA IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 890583-CA
v. :
RICKY PALMER, : Priority No. 2
Defendant-Petitioner. :

RESPONSE TO PETITION FOR REHEARING
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RESPONSE TO PETITION FOR REHEARING OF AN
APPEAL FROM A CONVICTION FOR RETAIL THEFT, A
THIRD DEGREE FELONY, IN VIOLATION OF UTAH
CODE ANN. § 76-6-602 (1953 AS AMENDED), IN
THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE LEONARD H. RUSSON, JUDGE,
PRESIDING.

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Clerk of the Court

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES PRESENTED ON PETITION FOR REHEARING	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	2
SUMMARY OF ARGUMENT.....	3
INTRODUCTION.....	4
ARGUMENT THIS COURT APPROPRIATELY REMANDED DEFENDANT'S CASE TO THE TRIAL COURT FOR DETERMINATION OF THE INEVITABLE DISCOVERY ISSUE.....	4
CONCLUSION.....	7

TABLE OF AUTHORITIES

CASES CITED

	Page
<u>Cummings v. Nielson</u> , 42 Utah 157, 129 P. 619 (1913)....	4
<u>Nix v. Williams</u> , 467 U.S. 431 (1984).....	6
<u>State v. Palmer</u> , 147 Utah Adv. Rep. 42 (Utah Ct. App. Nov. 14, 1990).....	2, 4, 7
<u>State v. Sery</u> , 758 P.2d 935 (Utah Ct. App. 1988).....	1-2
<u>State v. Vincik</u> , 436 N.W.2d 350 (Iowa 1989).....	6
<u>United States v. Boatwright</u> , 822 F.2d 862 (9th Cir. 1987).....	7
<u>United States v. Ramirez-Sandoval</u> , 872 F.2d 1392 (9th Cir. 1989).....	6-7

CONSTITUTIONS, STATUTES AND RULES

Utah Code Ann. § 76-6-412 (1990).....	1
Utah Code Ann. § 76-6-602 (1990).....	1

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STATEMENT OF ISSUES PRESENTED ON PETITION FOR REHEARING

Defendant presents two issues in his petition for rehearing:

1. Did the Court erroneously remand this case to the trial court for a determination of the inevitable discovery question?

2. If the Court correctly remanded the case to the trial court for a determination of the inevitable discovery question, does the Court's opinion give adequate guidance to the lower court concerning the scope of its consideration of that question?

STATEMENT OF THE CASE

Defendant, Ricky Palmer, was charged with retail theft, a third degree felony, under Utah Code Ann. §§ 76-6-602 and 76-6-412(1)(b)(i) (1990) (R. 6-7).

After the trial court denied defendant's motion to suppress, defendant entered and the court accepted a conditional guilty plea to the charge pursuant to State v. Sery, 758 P.2d

935, 938 (Utah Ct. App. 1988) (R. 31-37; T. 81-83). Under Sery, defendant preserved the suppression issue for appellate review.

On appeal, this Court ruled that the trial court had erroneously denied defendant's motion to suppress the x-ray of defendant, because the warrantless x-ray, which revealed the presence of the stolen ring in defendant's body, violated the fourth amendment. However, the Court remanded the case to the trial court to determine whether the ring would inevitably have been discovered by the police. State v. Palmer, 147 Utah Adv. Rep. 42 (Utah Ct. App. Nov. 14, 1990). Defendant petitioned for rehearing, and this Court requested that the State file a response.

STATEMENT OF FACTS

Most of the facts pertinent to defendant's petition for rehearing are accurately set forth in the Court's opinion. Palmer, 145 Utah Adv. Rep. at 42-43. One additional relevant fact not set forth there is that after Sgt. Mayo was unable to secure a suitable isolation cell for defendant at the Salt Lake County Jail, he sought and obtained defendant's apparent consent to an x-ray examination (T. 13, 28, 30-31). Defendant accurately sets forth in his petition the portion of Sgt. Mayo's testimony that is relevant to the question of what arrangements he pursued with the Salt Lake County Jail concerning an isolation cell for defendant. Pet. at 3-6. A stipulation of facts entered into by the parties further described the circumstances of defendant's placement in an isolation cell. That stipulation was as follows:

[I]f Det. Earl Price were called, he would testify to several things. First would be

that he arranged for Mr. Palmer to be placed in the Salt Lake County Jail in an isolation cell where Mr. Palmer could not leave and Mr. Palmer's feces could not leave, and it would be retained.

Additionally, that he informed Mr. Palmer that he would remain in the cell until the ring was produced and that Mr. Palmer, in response to that, admitted that he had the ring and eventually did produce the ring to Det. Price who has the ring in custody and that if he were called he would bring the ring and it would be produced into evidence.

(T. 61-62).

SUMMARY OF ARGUMENT

In arguing that the stolen ring contained in defendant's body would inevitably have been discovered by the police, the State necessarily relied on the record developed in the trial court. Accordingly, the State agrees with defendant that a remand of the case for further factual development would not be proper. However, the State disagrees with defendant that "the evidence [presented to the trial court] is capable of a single factual determination which leads to the legal conclusion that the inevitable discovery doctrine is not applicable to the instant case." Pet. at 11. Although admittedly a close question, the trial court could find that the record demonstrates by a preponderance of the evidence that the ring would inevitably have been discovered through lawful means--i.e., that the record demonstrates that the police, once they suspected that defendant had swallowed the ring, intended to place defendant in an isolation cell at some point in an effort to recover the ring.

Therefore, the Court could properly remand the case to the trial court for the limited purpose of determining, based on

the record already developed, the "fact-sensitive" question of whether the ring would inevitably have been discovered by the police.

INTRODUCTION

A petition for rehearing is appropriate only when the Court has "misconstrued or overlooked some material fact or facts, or . . . overlooked some statute or decision which may affect the result, or . . . based the decision on some wrong principle of law, or . . . misapplied or overlooked something which materially affects the result." Cummings v. Nielson, 42 Utah 157, 172, 129 P. 619, 624 (1913). The argument portion of this brief will demonstrate that rehearing is not warranted.

ARGUMENT

THIS COURT APPROPRIATELY REMANDED DEFENDANT'S CASE TO THE TRIAL COURT FOR DETERMINATION OF THE INEVITABLE DISCOVERY ISSUE.

After ruling that the trial court had erroneously determined that the warrantless x-ray of defendant was lawful, this Court remanded defendant's case to the trial court for a determination of the "fact-sensitive" issue concerning inevitable discovery of the ring. State v. Palmer, 147 Utah Adv. Rep. 42, 45 (Utah Ct. App. Nov. 14, 1990). Defendant claims that a remand is inappropriate because "the evidence [presented to the trial court] is capable of a single factual determination which leads to the legal conclusion that the inevitable discovery doctrine is not applicable to the instant case." Pet. at 11. Contrary to defendant's view, this Court appropriately remanded the inevitable discovery question to the trial court for an initial determination.

As defendant correctly points out, Sgt. Mayo's testimony is critical to a determination of whether the ring would inevitably have been discovered by the police through their placement of defendant in an isolation cell, as they did after obtaining the x-ray which revealed the ring inside of defendant's body. Admittedly, it is not entirely clear from Mayo's testimony what the intentions of the police were with respect to isolating defendant prior to the time the incriminating x-ray was obtained. However, his testimony, coupled with other evidence, raises a question of fact about whether defendant would necessarily have been placed in an isolation cell by the police in an effort to recover the ring, regardless of whether an x-ray of defendant had been obtained. Contrary to defendant's contention, Mayo's testimony is not susceptible to only one interpretation--i.e., that once Mayo had received word from the jail that the requested isolation cell was not available, the police did not intend to place defendant in such a cell at some future time (as they ultimately did). Clearly, Mayo was interested in securing a suitable isolation cell, and when that was not immediately available, he sought defendant's consent to an x-ray examination. Having received defendant's apparent consent to an x-ray, Mayo discontinued his efforts to secure an isolation cell. Nevertheless, such a cell was subsequently used by the police to recover the ring. Given the suspicions of the police that defendant had swallowed the ring, and Mayo's initial efforts to place defendant in isolation (efforts which appear to have been temporarily terminated because defendant consented to an x-ray),

it seems quite clear that the police would have placed defendant in an isolation cell in an effort to recover the ring, even without the incriminating x-ray. In short, the police would have done so whether they had been certain that defendant had swallowed the ring (which they were after the x-ray of defendant) or merely suspicious that he had swallowed the ring (which they would have been had they not obtained an x-ray), since the only means of recovering the ring, an important piece of physical evidence, would be to place defendant in isolation.

Although on remand the trial court would not be obligated to make the foregoing findings regarding inevitable discovery, it could validly do so and thus conclude that the record demonstrates by a preponderance of the evidence that the ring would inevitably have been discovered through lawful means by the police. See United States v. Ramirez-Sandoval, 872 F.2d 1392, 1396 (9th Cir. 1989) ("The 'inevitable discovery' exception adopted by the Court in Nix v. Williams, 467 U.S. 431 (1984), allows the introduction of illegally obtained evidence if the government can show by a preponderance of the evidence that the tainted evidence would inevitably have been discovered through lawful means."). See also State v. Vincik, 436 N.W.2d 350, 354 (Iowa 1989) (though gun on bed under sheet obtained in illegal warrantless search at homicide scene, inevitable discovery rule applicable, as the gun was certain to be discovered upon later removal of body). And such a ruling would be consistent with the requirement of the inevitable discovery doctrine that "'the fact or likelihood that makes the discovery inevitable arise from

circumstances other than those disclosed by the illegal search itself.'" Ramirez-Sandoval, 872 F.2d at 1396 (quoting United States v. Boatwright, 822 F.2d 862, 864-64 (9th Cir. 1987)). In short, the trial court should be given the opportunity to address this open, and admittedly close, factual question.

Therefore, the Court appropriately remanded defendant's case to the trial court for an initial determination of the fact-sensitive issue of inevitable discovery. It correctly concluded that "[t]his court cannot properly determine the outcome of a fact-sensitive issue where the record below is not clear and uncontroverted, or capable of only one finding." Palmer, 147 Utah Adv. Rep. at 45 (citation omitted).

The State agrees with defendant that the trial court's determination should be made upon the record already developed before it, and that the taking of additional evidence would not be appropriate. If the Court concurs in this view and further believes that its opinion does not make this view clear, it should modify its opinion accordingly.

CONCLUSION

Based on the foregoing argument, the Court should deny rehearing.

RESPECTFULLY submitted this 22nd day of January, 1991.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Response to Petition for Rehearing were mailed, postage prepaid, to James C. Bradshaw and Joan C. Watt, Salt Lake Legal Defender Assoc., Attorneys for Petitioner, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 22nd day of January, 1991.

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